No. 91-591

In the Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONER

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"What is of paramount importance," this Court has written, "is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley* v. *United States*, 490 U.S. 545, 556 (1989). Our opening brief, and the Solicitor General's amicus brief, present a clear interpretive rule that is amply supported by this Court's decisions and suffices to decide this case: a federal charter provision that explicitly empowers an entity to sue and be sued in the federal courts is a grant of original federal jurisdiction. By contrast, respondents' brief and that of the Association of Trial Lawyers of America (ATLA) make only one halfhearted stab at a clear interpretive rule (one that demands mention of a *particular* federal court) amidst a hodgepodge of arguments that would invite jurisdictional chaos.

The particular-federal-court rule fails because it is inconsistent with *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942), and with the reasoning of *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Respondents' other arguments are similarly infirm.

1. *Case law.* Respondents and ATLA largely repeat the First Circuit's reading of this Court's cases. We showed that reading to be erroneous in our opening brief, and nothing that respondents or ATLA have said improves on it.

Respondents and their amicus insist that the dispositive features in *Osborn* were that the Bank charter mentioned a *particular* federal court, *i.e.*, the circuit courts (Resp. Br. 6-17; ATLA Br. 3-6), and that the Bank charter referred to state courts "of competent jurisdiction" rather than treating state and federal courts in a "parallel" fashion (Resp. Br. 14-17; ATLA Br. 7-9). Respondents also insist (Br. 11) that only unambiguous charter language will support federal jurisdiction. But, as we demonstrated in our opening brief (at 16-26), this Court ascribed no significance whatever to the features respondents would use to distinguish *Osborn*, and those features were lacking from the provision that, according to this Court, supported federal jurisdiction in *D'Oench*. Likewise, no presumption against jurisdiction exists in this context, and any such presumption would be overcome by the clear words of the Red Cross charter.

a. Respondents and ATLA misread the decisions of this Court that have declined to interpret sue-and-be-sued clauses containing general references to courts as creating federal jurisdiction. The "generality" that militated against federal jurisdiction in

Bank of the United States v. *Deveaux*, 9 U.S. (5 Cranch) 61 (1809), and in *Bankers Trust Co.* v. *Texas & Pacific Railway*, 241 U.S. 295 (1916), was the charters' failure to refer to the federal courts at all in the sue-and-be-sued clause, *not* their failure to specify a *particular* federal court. The Court underscored this point in *Osborn* by stressing that the *Deveaux* charter did not create federal jurisdiction because it failed to "mention[] the *courts of the Union*" (22 U.S. (9 Wheat.) at 818) (emphasis added), whereas the bank charter in *Osborn* did create jurisdiction because it "enabl[ed] the Bank to sue in the Courts of the United States" (*id.* at 828).

The decision in *D'Oench* confirms that reference to a particular federal court is not necessary to create federal jurisdiction. There, the Court ruled that a sue-and-be-sued clause that authorized suit "in any court of law or equity, State or Federal," but that did not identify a particular federal court, was a grant of original federal jurisdiction. 315 U.S. at 455. Although the charter "further provide[d]" that actions in which the FDIC is a party were deemed to arise under federal law (*id.* at 455 n.2), the contexts in which the Court quoted the sue-and-be-sued clause and the "arising under" provision make it unmistakable that this Court thought that the former conferred jurisdiction.

Respondents and ATLA try to avoid *D'Oench* by asserting, as did the First Circuit, that this Court *should have* relied on the "arising under" provision to the exclusion of the sue-and-be-sued clause in finding jurisdiction. But that assertion, and the accompanying discussions of the legislative history of the FDIC charter (Resp. Br. 20-22; ATLA Br. 10-11; Pet.

App. 10a-11a & n.5), amount to nothing more than a challenge to this Court's observation in *D'Oench* that jurisdiction rested on the sue-and-be-sued clause. The views of the handful of legislators or staffers who had input into the Senate Report accompanying the Banking Act of 1935, who apparently failed to appreciate that there already was federal jurisdiction over all FDIC cases, are hardly compelling evidence that this Court was wrong. Even if the Court *was* mistaken, however, this much is clear: in the immediate aftermath of *D'Oench*, Congress was entitled to assume that a sue-and-be sued clause worded exactly like the FDIC's conferred federal jurisdiction, because this Court had said so.[1] And it was in the immediate aftermath of *D'Oench* that Congress amended the Red Cross sue-and-be-sued clause so that, in pertinent part, it *did* read exactly like the FDIC clause.

Respondents and ATLA misunderstand our point when they say (Resp. Br. 19; ATLA Br. 10-11 &

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[1] In *Molzof* v. *United States*, 112 S. Ct. 711 (1992), this Court recently reaffirmed the proposition that Congress may rely on the settled meaning of terms with a history of judicial interpretation:

> "[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word * * *."

Id. at 716 (quoting *Morissette* v. *United States*, 342 U.S. 246, 263 (1952)); see also *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Where Congress uses terms that have accumulated settled meaning * * * a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947), *quoted in Moskal* v. *United States*, 111 S. Ct. 461, 472 (1990) (Scalia, J., dissenting).

n.4) that we have dismissed the "deemed to arise under" language in the FDIC charter on the ground that the *D'Oench* Court "relegated [it] to a lowly footnote." The reason the "arise under" language cannot be regarded as the basis for federal jurisdiction in *D'Oench* is that the Court cited it solely as something the FDIC Act "further provides," as opposed to the sue-and-be-sued clause that the Court cited immediately after stating that federal jurisdiction was not based on diversity. 315 U.S. at 455 & n.2. Only a purposeful reading of *D'Oench*, not a neutral and fair one, could lead to the conclusion that the Court chose such a strange way to say that jurisdiction was based on the "arising under" clause and not the sue-and-be-sued clause.

b. Respondents also attempt (Br. 16-17) to distinguish the Red Cross charter from the bank charter in *Osborn* on the ground that the phrase "of competent jurisdiction" appears in the portion of the bank charter dealing with state courts, but is absent in the corresponding section of the Red Cross charter. This distinction, however, cannot bear the weight respondents place on it.

First, as detailed in our opening brief (Pet. Br. 23-26), the *Osborn* Court placed no significance whatever on the fact that the bank charter's references to state and federal courts were not "parallel." Indeed, the distinction that respondents now claim to be crucial was not even addressed to, let alone endorsed by, the *Osborn* court.

Second, the sue-and-be-sued clause in *D'Oench* treated state and federal courts in exactly parallel fashion (suit permitted "in any court of law or equity, State or Federal"), yet that did not prevent

this Court from ruling that the clause conferred federal jurisdiction. *D'Oench* thus reaffirms what *Osborn* demonstrates: a reference to the federal courts in a sue-and-be-sued clause is a grant of federal jurisdiction; nothing more is necessary.

c. Also inaccurate is respondents' assertion (Br. 9-11) that the *Bankers Trust* decision, insofar as it construed the sue-and-be-sued clause, "rested at least in part" on legislation (Act of Jan. 28, 1915) that denied federal jurisdiction based solely on the fact of federal incorporation. The *Bankers Trust* Court rejected three asserted bases of federal jurisdiction in three numbered segments of its opinion. Segment 1 (241 U.S. at 303-305) rejected as a basis of jurisdiction the sue-and-be-sued clause, which did not mention the federal courts, solely on the authority of *Deveaux*. The Court made no mention of the 1915 legislation. Segment 2 (*id.* at 305-309) rejected the argument that "the bill shows that the suit is one arising under the laws of the United States apart from the incorporation of the Texas and Pacific Railway Company under acts of Congress" (*id.* at 303). It is in that segment of the opinion—having absolutely nothing to do with interpretation of a sue-and-be-sued clause—that the 1915 legislation was discussed. Segment 3 (*id.* at 309-310) rejected an assertion of diversity jurisdiction and is irrelevant for present purposes. To divine from the Court's carefully compartmentalized reasoning in *Bankers Trust* a sort of penumbral relevance of 28 U.S.C. § 1349 and like statutes to the interpretation of sue-and-be-sued clauses, as the First Circuit did (Pet. App. 8a), is sloppy reasoning at best.

Respondents and their amicus (Resp. Br. 11-12; ATLA Br. 7, 9-10) embrace the proposition, pro-

pounded by the First Circuit based solely on its gestalt reading of *Bankers Trust* (Pet. App. 8a-9a), that statutes are presumed not to create federal jurisdiction. Nothing that respondents cite supports any such presumption, nor has such a presumption ever played a role in this Court's decisions construing sue-and-be-sued clauses.[2] Nor is the language that confers federal jurisdiction in Red Cross cases ambiguous; to the contrary, at the time the Red Cross charter was amended, reference to the federal courts in a sue-and-be-sued clause was understood to create original federal jurisdiction. See Pet. Br. 27-30.

2. *Legislative history.* The legislative history supports our position, not respondents'. ATLA (Br. 13), unlike respondents (Br. 22), acknowledges that the words chosen by Congress are the best indication of congressional intent. For the reasons already given, analysis of those words establishes that the Red Cross charter confers jurisdiction on federal courts. To avoid this conclusion, respondents (Br. 23) contest

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[2] Respondents seek to bolster the First Circuit's erroneous reading of *Bankers Trust* by contending (Br. 5-6, 12, 22) that the Red Cross bears a "burden of proof" to justify removal from state to federal court. The party seeking to justify removal bears a "burden of proof" only in the sense that it must show the factual predicates for federal jurisdiction such as diversity of citizenship (*Wilson* v. *Republic Iron & Steel Co.*, 257 U.S. 92, 96-99 (1921)) or the requisite jurisdictional amount. This "burden" has no application to disputed legal principles. See 1A J. Moore & B. Ringle, *Moore's Federal Practice* ¶ 0.168[4.-1], at 646 (1990); see also 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3739, at 574 n.6 (1985) (collecting cases). In the present case, there are no factual predicates to contest. Whether the Red Cross charter creates original federal jurisdiction is purely a question of law.

the proposition that Congress can rely on this Court's interpretations of legal terms, and assert that events *after* enactment are better guides to congressional intent. Neither argument can prevail.

a. This Court has held repeatedly that Congress is presumed to adopt the settled meanings of the words it employs in legislation. See note 1, *supra*; Pet. Br. 27-29. This "cardinal rule of statutory construction" (*Molzof*, 112 S. Ct. at 716) contradicts respondents' unwarranted assumption (Br. 23) that Congress was ignorant of *Osborn* and *D'Oench* when it amended the Red Cross charter.

Respondents also denigrate the "so-called Harriman Report" (Br. 22) as "ambiguous at best" (Br. 24), and suggest that the 1947 amendment sought merely to clarify the Red Cross's *capacity* to be sued in state and federal courts. To the contrary, Recommendation 22 stated expressly that, "in view of the limited nature of the *jurisdiction* of the Federal Courts, it seems desirable that this *right* be clearly stated in the charter." Harriman Committee Report 35, 36, Pet. Br. App. 3a, 4a (emphasis added).[3] Respondents are at a loss to explain how the limited nature of the jurisdiction of the federal courts can have any bearing on an entity's capacity to be sued in them. In addition, the 1905 charter already gave the Red Cross the express right "to sue and be sued in courts of law and

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[3] ATLA, without ellipsis, quotes this passage but excises the words "the jurisdiction of." ATLA Br. 15. ATLA also doubts that Congress adopted the Harriman Committee's intentions (*id.* at 14), but the Harriman Committee's recommendations were the acknowledged basis of Congress's 1947 amendments to the Red Cross charter. S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947).

equity" (Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600); both state and federal courts are "courts of law and equity," so clarification of the capacity for suit was clearly unnecessary. At bottom, respondents assert that the added words "State or Federal" in the Red Cross charter have no meaning at all. That position cannot be correct. See *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990) (noting the "established principle that a court should 'give effect, if possible, to every clause and word of a statute' ") (quoting *Montclair* v. *Ramsdell*, 107 U.S. 147, 152 (1883)).

Respondents' and amicus's observation (Resp. Br. 26-27; ATLA Br. 15-16) that Congress had many concerns other than jurisdiction when it amended the Red Cross charter in 1947 is entirely beside the point. Naturally there are references to "corporate structure" in the legislative history—most of the proposed changes pertained to the Red Cross's organizational structure. But to infer from this that the amendment specifically addressing jurisdiction must therefore be construed as importing mere corporate capacity is, to borrow Chief Justice Marshall's phrase, "surely a conclusion which the premises do not warrant." *Osborn*, 22 U.S. (9 Wheat.) at 818.[4]

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[4] Respondents mention in passing that the Red Cross's sue-and-be-sued clause appears "in the context of an enumeration of corporate powers such as the capacity to hold real and personal property, to accept gifts and devises, to adopt a seal and other emblems, to sue and be sued, and to do other similar acts." Resp. Br. 13. The placement of the clause amid other, more mundane grants of corporate power cannot detract from its force as a grant of jurisdiction, for the clauses at issue in *Osborn* and *D'Oench* kept equally undistinguished company. See Act of April 10, 1816, ch. 44, § 7, 3 Stat. 269; Banking Act of 1933, ch. 89, § 8, 48 Stat. 172; see also *Osborn*, 22 U.S. (9 Wheat.) at 876-879 (Johnson, J., dissenting).

b. Respondents echo the First Circuit's reliance on negative inferences from extraneous sources to support their position. In particular, respondents argue (Br. 27-29) that subsequent congressional enactments in completely different areas should be used to introduce ambiguity into previously enacted statutes like the Red Cross charter. We have already rebutted that contention (see Pet. Br. 39-44), and it is unnecessary to repeat those arguments here. It bears note, however, that respondents' proposed method would throw all statutory construction into chaos. Settled constructions of existing statutes would forever be at the mercy of lawyers who seek to reinterpret them "in light of" subsequent statutes that address completely different subjects.[5] Yet just last month this Court reaffirmed that the correct approach to statutory construction is to determine the meaning words had *at the time Congress chose to employ them*. *Molzof*, 112

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[5] This Court's decision in *United States* v. *Hutcheson*, 312 U.S. 219, 236 (1940), which respondents cite (Br. 28), in no way supports their position. In *Hutcheson*, subsequent legislation (the Norris-LaGuardia Act) threw light on an earlier statute (the Clayton Act) because the Court determined that it was specifically intended to disapprove two decisions of this Court interpreting the Clayton Act. Respondents' reliance (Br. 28) on *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945), also is unavailing. In *Alcoa*, the court did not cite later statutes, as the First Circuit did here, in order to show that language Congress used in an earlier statute was inadequate to accomplish its purpose. Quite the contrary, the *Alcoa* court cited the purposes of later statutes (not their language) solely to show "[t]hat Congress is still of the same mind" as it was when it passed the Sherman Act. A similar approach here would, if anything, lead to the conclusion that Congress in 1947-1948 had a general purpose to centralize actions against government agencies and instrumentalities in the federal courts.

S. Ct. at 716; see also U.S. Br. 14-15. From this perspective, the reference to federal courts in the Red Cross charter did in fact create original federal jurisdiction.

3. "*Policy considerations.*" We demonstrated in our opening brief that this Court's cases set out an interpretive rule that is dispositive in the Red Cross's favor (Pet. Br. 14-26), and that the legislative history of the Red Cross charter lends further support to our position if any is needed (Pet. Br. 37-45). However, because courts sometimes wonder why Congress would have wished to reach a particular result, we also included in our brief (at 26-36) a section discussing the reasons why *Osborn* should not be narrowed and the reasons why federal jurisdiction over the Red Cross makes sense. We concluded that, "of course, the foregoing concerns are relevant only insofar as they bear on the proper outcome as a matter of *statutory construction.*" Pet. Br. 36 (emphasis in original).

Nevertheless, we find ourselves accused of inviting judicial legislation (ATLA Br. 2-3, 12, 17-18, 19) and confronted with an array of competing "policy considerations" (Resp. Br. 33-38). We reiterate that we do not ask this Court to make policy, only to give its cases and (if appropriate) the legislative history the balanced reading that the First Circuit did not give them. See Pet. Br. 16, 45. The considerations that we discussed in our opening brief, however, remain valid, and respondents' contrary "policy considerations" should not carry the day.

Respondents cite a consistent congressional policy of "limiting federal jurisdiction (except for government owned corporations and agencies) to those situa-

tions where the controlling law is federal." Resp. Br. 33. Such a perceived policy is not enlightening. The Red Cross, as a government instrumentality (*Department of Employment* v. *United States*, 385 U.S. 355, 360 (1966)), indeed an "agency of the Government of the United States" for some purposes (Harriman Committee Report 20, Pet. Br. App. 2a), is no ordinary litigant.[6] There is no reason to believe that Congress subjected it to jurisdictional "policies" that govern ordinary litigants rather than those applicable to governmental entities. Respondents invoke the proverbial "floodgate" scenario, warning that the federal courts will soon be buried by pedestrian state-law claims that the Red Cross, for sinister motives, will remove from state courts. Resp. Br. 34-35; see also ATLA Br. 18-19. But that scenario no more justifies a narrow reading of the Red Cross charter than it would justify a narrow reading of any provision (such as 28 U.S.C. § 1332 or the Federal Tort Claims Act or the Racketeer Influenced and Corrupt Organizations Act) that would force the federal courts to deal with state law. In any event, the prospect of opened floodgates is far more theoretical than real. As noted before (Pet. Br. 36 n.8), and as actual experience shows, the Red Cross's policy is to remove only those suits that implicate some significant interest of the national organization.

Respondents also assert (Br. 35-36) that a decision favoring federal jurisdiction will force plaintiffs to pursue concurrent cases in state and federal courts. But, as we noted in our opening brief (at 35 n.6), 28 U.S.C. § 1367(a) provides for pendent-party juris-

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[6] In response to this point, respondents make (Br. 36) the same arguments that failed to convince this Court in the *Department of Employment* case.

diction to the fullest extent permitted by Article III of the Constitution. And contrary to respondents' claim (Br. 35), that statute has been interpreted in dozens of cases and has been accorded a liberal interpretation. See, *e.g.*, *Sinclair* v. *Soniform, Inc.*, 935 F.2d 599, 603 (3d Cir. 1991); *Jones* v. *Village of Villa Park*, 1992 U.S. Dist. LEXIS 736 (N.D. Ill. Jan. 28, 1992) (maintaining pendent-party jurisdiction over party where sole federal claim against that party was dismissed); *Garcia* v. *City of Chicago*, 1991 U.S. Dist. LEXIS 18966 (N.D. Ill. Dec. 23, 1991) (same); *Estate of Bruce* v. *City of Middletown*, 1992 U.S. Dist. LEXIS 379 (S.D.N.Y. Jan. 8, 1992) (exercising pendent-party jurisdiction). Thus, where causes of action against multiple defendants constitute a single "case," Section 1367 enables federal courts to exercise jurisdiction over the pendent state-law parties. There is no compelling argument for joining all the parties together in one forum, state or federal, when this bare minimum constitutional requirement is not met.

Finally, ATLA asserts (Br. 18-19) that it is important, indeed demanded by respect for the state courts, to entrust state-law issues to the state systems. The fact of the matter is, issues of *both* state *and* federal law are bound to arise in cases such as this one, and there is no single, inherent, "right" answer to the question whether such cases should proceed in federal or state court, since both systems surely *are* capable of resolving both types of issues at least passably well.[7] But Congress has decided that

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[7] Respondents are wrong, however, to suggest that, just because there is no "*assurance* of uniformity when federal courts address Red Cross issues" (Resp. Br. 37) (emphasis added)), entrusting those issues to the federal courts will not *promote* uniformity of decisions. If entrusting particular

certain categories of important cases deserve "the protection of a federal forum" even though they raise issues of state law. *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). One must either ignore *D'Oench* and read *Osborn* as a lawless decision premised solely on solicitude for the Bank of the United States rather than the sue-and-be-sued clause on which it purported to rest, or else concede that Congress has identified actions by or against at least *some* federally chartered entities as one such category. Once that much is conceded, it becomes easy to conclude—indeed, even the First Circuit concluded (Pet. App. 15a-16a)—that the Red Cross logically is one of the entities that Congress would have wanted to be able to litigate all cases in federal court.

4. *Constitutional concerns.* Respondents' constitutional argument (Br. 30-33) rests on an apparent misunderstanding of the difference between statutory and constitutional "arising under" jurisdiction. This leads respondents to the ambitious suggestion (Br. 32) that this Court should overrule *Osborn*'s constitutional holding in order to create a constitutional doubt that in turn would call for a narrow interpretation of the Red Cross charter.

Contrary to respondents' apparent belief, the Red Cross need not rely on *statutory* "arising under" jurisdiction under 28 U.S.C. § 1331, because its charter constitutes an *independent statutory grant* of federal jurisdiction that is not dependent on Section 1331. At the same time, however, it is crystal clear that this case does "aris[e] under * * * the Laws of the

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issues to the federal courts did not promote uniformity at all, there would be little reason *ever* to provide for federal jurisdiction except in diversity cases.

United States" within the meaning of Article III, Section 2, Clause 1, of the Constitution. "Art. III 'arising under' jurisdiction is broader than federal-question jurisdiction under § 1331, and * * * heavy reliance on decisions construing that statute [i]s misplaced." *Verlinden, B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 495 (1983). In particular, constitutional "arising under" jurisdiction is broader than statutory "arising under" jurisdiction because "[t]he controlling decision on the scope of Art. III 'arising under' jurisdiction is Chief Justice Marshall's opinion for the Court in *Osborn* v. *Bank of the United States*" (*Verlinden*, 461 U.S. at 492; see also *id.* at 497), and *Osborn* addresses the precise constitutional question that respondents regard as doubtful. See also *Bank of the United States* v. *Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824) (upholding Bank's right, because of its charter, to sue in federal court to recover on promissory note); P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 983 (3d ed. 1988) [hereinafter *Hart and Wechsler*].

Osborn's constitutional holding is no sport. Because "a corporation has no powers and can incur no obligations except as authorized by federal law" (*Puerto Rico* v. *Russell & Co.*, 288 U.S. 476, 485 (1933)), a federal question is raised (even if it is easily decided) every time a federally chartered corporation is sued, and that fact suffices to satisfy Article III, leaving only the question whether Congress has in fact exercised the power to confer federal jurisdiction. Accord *Bankers Trust*, 241 U.S. at 305-309.[8] Thus, this Court's decision in the *Pacific Rail-*

[8] Suits against corporations that owe their very existence and amenability to suit to the federal government thus are

road Removal Cases, 115 U.S. 1 (1885), although legislatively overruled years before this Court decided *Puerto Rico* v. *Russell*, remained valid authority for, and was cited for, the constitutional proposition just quoted. On other occasions when this Court has found *statutory* jurisdiction lacking, it has been careful to repeat *Osborn*'s *constitutional* holding. "As long ago as *Osborn* v. *Bank of the United States*, *supra*, it was settled that a suit by or against a corporation chartered by an act of Congress is one arising under a law of the United States." *Bankers Trust*, 241 U.S. at 305. "[T]he doctrine of the charter cases [i]s to be treated as exceptional, though within their special field there [i]s no thought to disturb them." *Gully* v. *First National Bank*, 299 U.S. 109, 114 (1936).

Possible implications of *Osborn*'s reasoning *outside* the realm of suits by and against federally chartered corporations, particularly its implication that there may be such a thing as "protective jurisdiction," have indeed been questioned. See, *e.g.*, *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting); *Hart and Wechsler* 983-984. But no source that respondents cite questions *Osborn*'s holding that Congress has the constitutional power to grant federal courts jurisdiction over all cases by and against federally chartered entities.

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easily distinguished from suits against individuals (even if they are employed by the federal government). Accordingly, *Osborn*'s constitutional holding is not called into the slightest doubt by *Mesa* v. *California*, 489 U.S. 121, 136-137 (1989). *Mesa* does not cite *Osborn* but relies on *Verlinden*, which reaffirmed *Osborn*'s status as "[t]he controlling decision on the scope of Art. III 'arising under' jurisdiction" (461 U.S. at 492).

That proposition is as settled as a constitutional proposition can be.

5. *The well-pleaded complaint rule.* Finally, respondents argue (Br. 38-46) that the well-pleaded complaint doctrine is relevant to this case. As we explained in the reply brief at the certiorari stage (at 6-7), that doctrine is an interpretation of 28 U.S.C. § 1331 (statutory "arising under" jurisdiction), which concededly does not apply to this action based on state law. The doctrine operates to deny federal jurisdiction under Section 1331 based on anticipated or actual defenses or counterclaims. 14A C. Wright, A. Miller & E. Cooper, *supra*, § 3722, at 257-260 (1985). It has no relevance to cases in which federal jurisdiction is conferred by a different statute such as 36 U.S.C. § 2. Cf. *Planters' Bank*, 22 U.S. (9 Wheat.) at 909 ("[T]he bank does not sue in virtue of any right conferred by the judiciary act, but in virtue of the right conferred by its charter. It does not sue, because the defendant is a citizen of a different state from any of its members, but because its charter confers upon it the right of suing its debtors in a circuit court of the United States.").

Respondents' contrary view (Br. 42) that "§ 1331 is fully applicable to any right of the Red Cross to invoke federal jurisdiction based on 36 U.S.C. § 2" simply reflects their continued failure to distinguish carefully between constitutional and statutory "arising under" jurisdiction. Constitutional "arising under" jurisdiction of course *is* applicable here, as noted above. Section 1331 (statutory "arising under" jurisdiction), on the other hand, is but one of many statutes conferring federal jurisdiction, and not the

one invoked by the Red Cross as the basis for removal here.[9]

If this Court rejects our view of 36 U.S.C. § 2, it will affirm the judgment below. If this Court agrees with us, however, that 36 U.S.C. § 2 confers original federal jurisdiction over all Red Cross cases, then the only fact necessary to bring this case within the relevant jurisdictional statute—the fact that the Red Cross is a party—will indeed be evident from the face of the well-pleaded complaint. Thus, even if it had merit, respondents' suggestion to import the well-pleaded complaint rule from Section 1331 into 36 U.S.C. § 2 would not alter the outcome of this case.

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[9] Respondents discuss at some length (Br. 44-46) the "status" of the Red Cross, apparently based on a misunderstanding of the statement in our reply brief at the certiorari stage (at 7) that "the Red Cross's right to a federal forum is based on its *status*." All we meant by that statement was that 36 U.S.C. § 2 confers on the Red Cross, just as certain other statutes confer on certain other federal entities, the right to sue and be sued in federal court, so that federal jurisdiction depends on who the party is and not what questions are raised. We do not, as respondents seem to think (Resp. Br. 12-13, 46), rely on 28 U.S.C. § 1349 or § 1442 as a basis for federal jurisdiction in this case, any more than we rely on Section 1331. We rely squarely and solely on 36 U.S.C. § 2.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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